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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. CHADWICK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-30a) is not yet reported. The opinion and supplemental opinion of the district court (App. C, *infra*, pp. 32a-63a) are reported at 393 F. Supp. 763.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 31a) was entered on March 29, 1976. On April 19, 1976, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including May 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a search warrant is required before federal agents may open a locked footlocker that is properly in their possession and that they have probable cause to believe contains contraband.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. On May 8, 1973, federal agents in Boston received reliable information from their San Diego counterparts that respondents Machado and Leary (then traveling as "Mrs. Machado") had loaded a

brown trunk or footlocker onto an Amtrak train in California and were bound for Boston (App. C, *infra*, p. 34a). The footlocker was leaking talcum powder, which is often used to cover up the odor of controlled substances. Respondent Machado also fit a profile used by Amtrak officials to spot drug traffickers (*ibid.*).

The train arrived in Boston on the evening of May 10, 1973, and federal agents met it at the station. The agents saw Machado make a telephone call after his arrival, but they were unable to see the number called or to overhear the conversation (App. C, *infra*, p. 35a). They observed the footlocker as it was removed from the train, placed on a baggage cart and taken to the station area, where it was claimed by Machado and Leary. Machado and Leary placed the trunk on the floor and sat down on it. Two suitcases were nearby.

The agents confirmed their suspicions by having a dog trained to smell controlled substances go to the footlocker.[1] The dog "alerted" to the footlocker by scratching on it, indicating that a controlled substance was inside (App. A, *infra*, p. 4a; App. C, *infra*, p. 35a). The agents did not have the dog sniff the suitcases.

Respondent Chadwick soon arrived at the station in an automobile. Leary and Machado, with the help

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[1] Investigation with the aid of a trained dog is permissible under the Fourth Amendment. *United States* v. *Race*, 529 F.2d 12 (C.A. 1); *United States* v. *Bronstein*, 521 F.2d 459 (C.A. 2).

of a porter, took the footlocker and suitcases to Chadwick's car. The footlocker and one suitcase were loaded into the trunk; Leary took the other suitcase and entered the front seat (App. C, *infra*, pp. 35a, 52a-53a). The agents then arrested all three respondents. Shortly after his arrest, respondent Chadwick made incriminating statements to the agents. The footlocker and the two suitcases were taken to a federal building in Boston where, approximately 90 minutes after the seizure, they were opened (*id.* at 35a-36a). The footlocker had been double-locked, and it was opened with keys that had been in the possession of Machado. The footlocker and both suitcases contained marijuana (*id.* at 35a, 53a).

2. On November 2, 1973, an indictment returned in the United States District Court for the District of Massachusetts charged respondents Machado, Leary and Chadwick with possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and with conspiracy to commit that crime, in violation of 21 U.S.C. 846. Respondents filed pretrial motions to suppress Chadwick's statements and the evidence obtained from the footlocker and the suitcases. In reply, the government argued that the search of the suitcases was a proper inventory inspection, necessary to protect agents against charges that they had stolen property that had been seized. It justified the opening of the footlocker both as a search incident to an arrest and as a search based upon the "automobile exception" to the Warrant Clause of the Fourth Amendment. The district court rejected each

of these arguments and suppressed the evidence obtained from the searches (App. C, *infra*, pp. 45a-51a, 54a-61a). It also suppressed respondent Chadwick's statements, holding that there had not been probable cause to arrest him and that the statements were tainted fruit of the illegal arrest (*id.* at 37a-44a, 62a-63a).

3. A divided court of appeals affirmed the suppression of the marijuana found in the footlocker.[2] The court concluded that the footlocker had been properly seized (App. A, *infra*, pp. 17a, 19a). It then inquired whether it was reasonable to open it. Beginning with the premise that warrantless searches are presump-

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[2] The court of appeals also affirmed the district court's suppression of respondent Chadwick's statement and of the marijuana found in the suitcases. We do not agree that there was not probable cause to arrest Chadwick, but we have not presented this as a question for this Court because it appears to involve only the application of settled principles to particular facts. As to the opening of the suitcases, we believe that under many circumstances it is reasonable to inspect personal belongings discovered near a person at the time of his arrest in a public place, a proposition with which the court of appeals has agreed. See Pet. App. 23a; *United States* v. *Eatherton*, 519 F.2d 603 (C.A. 1). In the present case, however, the agents did not possess probable cause to believe that the suitcases contained contraband, they were not recovered from an area within the immediate control of respondents at the time of their arrests, and the only justification offered in the court of appeals for their inspection was the agents' desire to "inventory" their contents. Under these circumstances, the opening of the suitcases does not present the same questions as does the opening of the footlocker, and we do not seek review of the judgment of the court of appeals insofar as it affirmed the district court's suppression of the marijuana seized from the suitcases.

tively unlawful in the absence of one of a few narrow circumstances, the court stated that "[t]he question * * * is whether [this] warrantless search fits within one of the exceptions to the constitutional requirement of a warrant" (*id.* at 8a). It concluded that it did not.

The "automobile exception" did not control, the court held, because the seizure of the footlocker occurred just after it had been deposited in the parked car's trunk and before any effort had been made to drive the car away. In these circumstances, the car "was nothing more than a platform or resting place for the footlocker," and the court perceived no reason "why the footlocker's placement in the car trunk should make it any more searchable than if the arrest had occurred in the station area" (*id.* at 9a-10a).

The court also held that the opening of the footlocker could not be justified as incident to the arrest of respondents. Noting that the trunk was securely locked and weighed approximately 200 pounds, the court held that the trunk was not "in any meaningful sense * * * under [respondents'] immediate control" at the time of their arrest, because they could not have either quickly removed it or reached inside it to destroy evidence or obtain weapons (App. A, *infra*, p. 15a).

Finally, the court rejected the argument that movable containers such as footlockers should be treated like automobiles. The court conceded that "baggage or goods in transit present some of the same characteristics as automobiles. Unless immobilized, such

items may disappear before a warrant is obtained" (App. A, *infra*, p. 17a). Expressly declining to follow other courts of appeals in this regard, however, the court refused to permit the warrantless search of the footlocker. The court believed that a rule allowing the search of such belongings on probable cause has not "received sufficient recognition by the Supreme Court outside the automobile area, or generally, for us to recognize it as a valid exception to the fourth amendment warrant requirement" (*ibid.*). The court concluded that "[i]f an exception of this character is to be translated to an entirely different class of objects, we think the Supreme Court should make the judgment" (*id.* at 18a-19a).[3]

The dissenting judge, aligning himself with other courts that the majority had declined to follow, argued that the opening of the footlocker was proper once "there was probable cause to believe that it contained contraband and was being used in committing the offense" (App. A, *infra*, p. 29a). In his view, "the principles which control the right of an officer to arrest without a warrant a person who is committing a felony in his presence in a public place should also permit the officer to open a suitcase, a

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[3] In a similar vein, the court earlier had said that, although the Supreme Court might "relax the 'immediate control' test in the baggage search area, by reinterpretation or otherwise[,] * * * it would be speculation, and perhaps even presumption, for us to initiate such a change" (App. A, *infra*, pp. 12a-13a, n. 4).

footlocker or other container which he has probable cause to believe is being used to commit the offense in his presence and to seize the contraband therein" (*id.* at 29a-30a; footnote omitted).

REASONS FOR GRANTING THE PETITION

1. The agents' decision to open the footlocker, on probable cause to believe that it contained contraband, involves a fundamental but unresolved issue regarding the meaning of the Fourth Amendment. Simply put, the question here is whether portable containers such as footlockers and suitcases should be treated like dwellings or like automobiles for Fourth Amendment purposes. Stated more generally, the issue is whether probable cause searches of personal belongings seized outside the privacy of the home or office are presumptively unreasonable unless authorized by a warrant.

The court of appeals' holding that it was reasonable to seize the footlocker but unreasonable to search it without a warrant, although the officers had probable cause to believe that it contained contraband, exacerbates the confusion now reigning in the lower federal courts. The court of appeals recognized that it was taking a minority position and that other courts have adopted a variety of different approaches to the search of movable containers; the court concluded, however, that if standards applicable to one class of objects (automobiles) are to be applied "to an entirely different class of objects," this Court

should make the judgment (*id.* at 18a-19a). This Court should accept the invitation of the court of appeals to resolve this problem.

2. This case raises once again an issue that has sparked the "conflict that has been so notable in this Court's attempts over a hundred years to develop a coherent body of Fourth Amendment law" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 474). This conflict has been "caused by disagreement over the importance of requiring law enforcement officers to secure warrants" (*ibid.*). The underlying basis of that disagreement was summarized by Mr. Justice Stewart in *Coolidge* (*id.* at 474-475; footnotes omitted):

> Some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. Others have argued with equal force that a test of reasonableness, applied after the fact of search or seizure when the police attempt to introduce the fruits in evidence, affords ample safeguard for the rights in question, so that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."
>
> Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his

home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances." As to other kinds of intrusions, however, there has been disagreement about the basic rules to be applied, as our cases concerning automobile searches, electronic surveillance, street searches and administrative searches make clear.

This case (unlike *Coolidge*) does not involve "a search or seizure carried out on a suspect's premises" and does not therefore implicate the "accepted * * * principle, that [such] a search or seizure * * * without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'" (*ibid.*). Rather, it involves the kind of search and seizure with regard to which there has been uncertainty and disagreement "about the basic rules to be applied" (*id.* at 475).

The decisions of the courts of appeals concerning the search of personal belongings seized on probable cause outside the home have reflected that disagreement. Some, like the court below, hold that the opening of a package is *per se* unreasonable unless

authorized by a warrant.[4] Others have adopted the rule that probable cause alone is sufficient to justify the search of a personal belonging that has been properly seized.[5] Some adopt a presumptive warrant requirement, but relax that requirement when the package is seized from a vehicle[6] or when the package is seized at the time of arrest, whether or not the package is within the scope of the area for search incident to arrest delineated in *Chimel* v. *California*, 395 U.S. 752.[7] And still other courts appear to dis-

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[4] See, *e.g.*, *United States* v. *Garay*, 477 F.2d 1306, 1308 (C.A. 5); *United States* v. *Anderson*, 500 F.2d 1311, 1317-1318 (C.A. 5); *United States* v. *Lonabaugh*, 494 F.2d 1257 (C.A. 5). Cf. *United States* v. *Hand*, 516 F.2d 472, 476, n. 10 (C.A. 5) (*en banc*).

[5] See, *e.g.*, *United States* v. *Wilson*, 524 F.2d 595, 598-599 (C.A. 8), certiorari denied, No. 75-5884, March 1, 1976; *United States* v. *Buckhanon*, 505 F.2d 1079, 1082 (C.A. 8); *United States* v. *Valen*, 479 F.2d 467 (C.A. 3), certiorari denied, 419 U.S. 901; *United States* v. *Johnson*, 467 F.2d 630, 639 (C.A. 2), certiorari denied *sub nom. White* v. *United States*, 410 U.S. 932; *United States* v. *Mehciz*, 437 F.2d 145 (C.A. 9), certiorari denied, 402 U.S. 974 (although this case involves a suitcase seized at the time of arrest, the court announced a rule under which arrest would be irrelevant).

Several state courts have reached the same result. *People* v. *McKinnon*, 7 Cal. 3d 899, 500 P.2d 1097; *Waugh* v. *State*, 20 Md. App. 682, 318 A.2d 204, reversed on other grounds, 275 Md. 22, 338 A.2d 268; *Chaires* v. *State*, 480 S.W.2d 196 (Ct. Crim. App. Texas); *State* v. *Wolfe*, 5 Wash. App. 153.

[6] See, *e.g.*, *United States* v. *Soriano*, 497 F.2d 147 (C.A. 5) (*en banc*).

[7] See, *e.g.*, *United States* v. *Battle*, 510 F.2d 776, 778-779 (C.A.D.C.); *United States* v. *Kaye*, 492 F.2d 744, 746 (C.A. 6); *United States* v. *Ciotti*, 469 F.2d 1204 (C.A. 3), vacated on other grounds, 414 U.S. 1151; *United States* v. *Maynard*,

tinguish "small" packages from "large" packages, applying a presumptive warrant requirement only to the latter.[8]

This profusion of what appear to be arbitrary distinctions fully justifies Judge Thomsen's description of the law as a "thicket through which state and federal judges, as well as state and federal law enforcement officers, must struggle in cases such as this" (App. A, *infra*, p. 29a). There is no reason why officers must be required to cope with such inscrutable mysteries when dealing with the mundane matter of what to do with properly seized packages. This is a problem arising often in law enforcement, and the difficulties are real; we believe that the Court should address the problem here.

3. Our submission is that there is no support in the history or language of the Fourth Amendment

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439 F.2d 1086 (C.A. 9); *United States ex rel. Muhammad* v. *Mancusi*, 432 F.2d 1046 (C.A. 2), certiorari denied, 402 U.S. 911; *United States* v. *Robbins*, 424 F.2d 57 (C.A. 6), certiorari denied, 402 U.S. 985. These cases do not, by and large, require separate probable cause to believe that the package contains contraband or evidence.

[8] See, *e.g.*, *United States* v. *Eatherton*, 519 F.2d 603 (C.A. 1); *United States* v. *Micheli*, 487 F.2d 429, 431 (C.A. 1). As these cases indicate, the First Circuit's own attempt to establish a coherent rule for package searches has been unsuccessful. The court of appeals could articulate no principled difference between the footlocker search here and the search of a briefcase upheld in *Eatherton*. The result, to use the court's own words (App. A, *infra*, p. 15a), is a "'gossamer thin' distinction which arresting officers could find impracticable, if not impossible, to follow * * *."

for the view that every search or seizure—regardless of the nature of the privacy interest at stake—is presumptively invalid where a warrant could have been but was not obtained. In making this argument, we are not disputing what "is by now axiomatic that the Fourth Amendment's proscription of 'unreasonable searches and seizures' is to be read in conjunction with its command that 'no Warrants shall issue, but upon probable cause'" (*Almeida-Sanchez* v. *United States*, 413 U.S. 266, 277 (Powell, J., concurring)), nor are we denying that both the concept of probable cause and the presence or absence of a warrant are to be considered as bearing on the reasonableness of a search. Rather we submit that whether a search or seizure without a warrant should be deemed presumptively unreasonable depends on a determination whether the privacy interest at stake is of such magnitude that the interposition of a neutral and detached magistrate should be required to make the probable cause determination.

The classic example of a presumptively unreasonable search is one involving the warrantless entry into a home. But the footlocker here had been removed from the home and transported across country in the baggage compartment of a train. Respondents' expectations of privacy in it were surely no greater than their expectations of privacy in the contents of a car.

This Court has held that once a car has been properly seized, its interior can be searched without a warrant, even if a delay intervenes. *Cham-*

bers v. *Maroney*, 399 U.S. 42; *Texas* v. *White*, 423 U.S. 67. The reason for this rule can be traced to the diminished expectation of privacy that attends belongings willingly taken outside the house or office. It also is supported by the fact that a car is readily movable. And, finally, it is supported by the difficulty a court must face in determining the relative intrusiveness of immobilization and search.

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser' intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment. [*Chambers* v. *Maroney*, *supra*, 399 U.S. at 51-52.]

All of these considerations apply to footlockers and other items of portable personal property no less than to automobiles.[9]

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[9] *Chambers* drew guidance from prior decisions involving automobiles, beginning with *Carroll* v. *United States*, 267 U.S. 132. In one of those cases, *Preston* v. *United States*, 376 U.S. 364, the Court stated: "Common sense dictates, of course, that

The court of appeals, while acknowledging that "baggage or goods in transit present some of the same characteristics as automobiles" (App. A, *infra*, p. 17a), declined to follow this reasoning to its conclusion. It attempted to distinguish the package cases in other circuits by arguing that they involved "hand-carried briefcases and other luggage" (*id.* at 13a)

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questions involving searches of motorcars or *other things readily moved* cannot be treated as identical to questions arising out of searches of fixed structures like houses" (*id.* at 366; emphasis added). On the other hand, in *Coolidge* v. *New Hampshire*, 403 U.S. 443, Mr. Justice Stewart, speaking for a plurality of the Court, observed that if *Carroll* and its progeny permit "a warrantless search of an unoccupied vehicle, on private property and beyond the scope of a valid search incident to arrest, then it would permit as well a warrantless search of a suitcase or a box. We have found no case that suggests such an extension of *Carroll*" (*id.* at 461, n. 18). The *Coolidge* plurality was reluctant to extend the principles of *Carroll* to a search of an automobile (or other container) "on private property." See also *Rios* v. *United States*, 364 U.S. 253, 261, in which the Court, apparently without detailed consideration of the problem, articulated a presumptive warrant requirement for a package seizure and search without probable cause. On the other hand, in *Draper* v. *United States*, 358 U.S. 307, 314, the Court without detailed consideration upheld the warrantless opening of luggage seized at the time of an arrest.

In *Nugent* v. *United States*, 409 U.S. 1065, three Justices dissented from the denial of a writ of certiorari in a case that presented the issue whether police could search, with probable cause but without a warrant, a trunk found in the basement of an apartment building which they had entered with the landlord's consent. It is apparent, then, that the Court has not yet chosen an occasion explicitly to consider the application of *Carroll* and its progeny to the search of containers other than automobiles.

that clearly was movable, while the footlocker in this case "was far from portable, and too heavy even to be carried by the average person" (*id.* at 15a). But this cannot be persuasive, for a car, once seized (as in *Texas* v. *White*, *supra*), loses the mobility that may have justified the seizure; the Court still has upheld subsequent searches. And all of the other baggage search cases involve packages that had been reduced to the officers' possession before being opened.

4. The court of appeals, in our view, gave insufficient consideration to the combined weight of three factors: the nature of the property searched by the agents, the fact that the property was in the agents' lawful possession at the time of the search, and the fact that a "serious personal intrusion" (*United States* v. *Watson*, No. 74-538, decided January 26, 1976, concurring, slip op. 4 (Mr. Justice Powell)) into respondents' privacy already had occurred because of their arrest prior to the search.

The agents did not search a home, a place of business, or similar area, those places for which a warrant historically has been required. Nor did they search personal effects that could be found only by entering private premises (*Coolidge* v. *New Hampshire*, *supra*; see *Cady* v. *Dombrowski*, 413 U.S. 433, 446-447). Nor, lastly, was the search an invasion of a person's private thoughts or communications, as to which the locus of the intrusion may

fairly be deemed irrelevant (*Katz* v. *United States*, 389 U.S. 347).[10]

The agents searched a container of personal possessions that they encountered outside the privacy of the home and in circumstances recognized by the court of appeals to justify their seizing it forthwith.[11] Cf. 21 U.S.C. 881. Once that lawful intrusion had occurred, respondents' privacy interest in the contents of the footlocker had diminished to the point that a further intrusion, on probable cause, did not require the pre-search interposition of a magistrate. Indeed, as this Court recognized in *Chambers* v. *Maroney*, *supra*, to require a search warrant in such circumstances would be to demand precise and wholly unworkable calculations as to what constitutes the "greater" and what the "lesser" intrusion.

Respondents' privacy interest in their personal effects was further diminished by the fact that they

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[10] Likewise, it was not a search of a letter or package sent by first-class mail (*United States* v. *Van Leeuwen*, 397 U.S. 249). Because "'the use of the mails is almost as much a part of free speech as the right to use our tongues'" (*id.* at 251, quoting *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U.S. 407, 437 (Holmes, J., dissenting)), the Court has held that such letters and packages "are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles" (*Ex parte Jackson*, 96 U.S. 727, 733).

[11] The privacy interest of respondents was especially slight here because the agents had probable cause to believe that the footlocker contained nothing but contraband. In other words, they had probable cause to believe that there were *no* legitimate privacy interests in the contents of the footlocker.

were under lawful arrest at the time of the search.[12] As Mr. Justice Powell observed in *United States* v. *Robinson*, 414 U.S. 218, 237-238, "a valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee. The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest" (footnotes omitted). See also *United States* v. *Edwards*, 415 U.S. 800, 808-809, which emphasized the reduced privacy interest that an arrestee retains in his effects and approves the statement of a lower court that " '[w]hile the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence.' " [13]

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[12] This argument does not apply to respondent Chadwick, if the court of appeals was correct in concluding that his arrest lacked probable cause.

[13] This was particularly so, the Court held, "in view of the existence of probable cause linking the clothes [removed from the defendant] to the crime" for which he had been arrested (*id.* at 806). Similarly, in *Cooper* v. *California*, 386 U.S. 58, 61, the Court upheld the search of a defendant's car a week after his arrest, noting that the search "was closely related to the reason petitioner was arrested * * *." Here, too, the search of the footlocker was "closely related" to the reason respondents were arrested. In these circumstances, the abatement of their privacy interest effected by their arrest also encompassed the opening of the footlocker.

In sum, given the nature of the property searched, the lawful seizure of that property, respondents' arrests, and the existence of probable cause to believe that the footlocker contained contraband, it was reasonable for the agents to open it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 75-1165

UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH A. CHADWICK, ET AL.,
DEFENDANTS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*, CAMPBELL, *Circuit Judge*, THOMSON,* *Senior District Judge*

March 29, 1976

CAMPBELL, *Circuit Judge.* The United States has appealed under 18 U.S.C. § 3731 from the district court's allowance of motions to suppress evidence.

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* From the District of Maryland, sitting by designation.

Chadwick, Machado, and Leary, following their arrest on May 10, 1973, were indicated for possession of marijuana with intent to distribute and for conspiracy. 21 U.S.C. §§ 841(a)(1) and 846. Prior to their trial, they moved to suppress evidence of marijuana seized from a footlocker, two suitcases and Chadwick's person, and Chadwick's remarks while in custody. After an evidentiary hearing, the district court ruled in the defendants' favor, 393 F. Supp. 763, and it reaffirmed and amplified its rulings after hearing the Government's motion for reconsideration. *Id.* at 773. This appeal followed.

The circumstances of defendants' arrests and the subsequent searches were described by federal agents Richard G. Christopher and Paul L. LaVoie, both assigned to the Office for Drug Abuse Law Enforcement (ODALE), and by Robert Walsh, police officer for Penn Central Railroad. On May 8, 1973, information was relayed to LaVoie in Boston from the ODALE office in San Diego, California, that an old brown trunk or footlocker, suspected to contain marijuana, was en route from California to Boston by Amtrak train. The San Diego office had been tipped off by an Amtrak official, who suspected that the footlocker contained marijuana because it was leaking talcum powder, a material used to cover up the odor of controlled substances, and because of its unusual weight for its size, almost two hundred pounds. The appearance of the person shipping the footlocker, identified as Machado, fit a profile used by Amtrak officials to spot drug traffickers. The tag bore Ma-

chado's address in Scituate, Massachusetts. According to ticketing information, he was accompanied by another person later identified as Leary.

Descriptions of both Machado and the footlocker were transmitted to the Boston agents who learned that the train would arrive in Boston the evening of May 10. Between the eighth and the tenth, the agents sought no search or arrest warrants, but continued investigating. When the train passed through New Haven, Connecticut, prior to its arrival in Boston, Amtrak officials checked the baggage compartment and verified that the footlocker was still on board. Agent Christopher testified that "the suspicion was sufficient to justify an expenditure of men and energy at South Station," and so six law enforcement officials were gathered at South Station at 6:50 p.m. on May 10 to await the train. It finally arrived at 8:50 p.m., approximately one hour behind schedule. A few minutes later, Agent Christopher spotted a suspect fitting Machado's description inside the terminal. Christopher saw Machado make a telephone call but was unable to see the number which was dialed or overhear the conversation. Agent Christopher also saw the footlocker as it was removed from the baggage car, placed on a baggage cart, and taken in to the station area, where it was claimed by Machado and a female companion, later identified as Leary. They placed it on the floor near an abandoned magazine stand and sat down on it. Agent Christopher never saw the trunk open. The couple also had with them two suitcases.

The agents had brought with them Duke, a detector dog, trained to sniff out controlled substances. Duke's handler walked him on his leash by Machado and Leary several times. Agent Christopher then told the handler to release Duke near the footlocker, whereupon Duke went to the locker and gave an "alert response" by scratching on it, indicating that he detected a controlled substance inside. The handler had not been instructed, however, to have Duke also smell the suitcases, and so immediately after the alert to the footlocker, he picked up Duke's leash and walked Duke out of the building.

Chadwick was seen for the first time a few minutes later walking into the terminal. He came over to Machado and Leary and the three engaged in conversation for a moment. Chadwick then left the terminal [1] and went outside to the street where a Dodge Polara, later found to have been rented, was parked. Machado and Leary engaged a red cap who physically transported the footlocker out to the car where Chadwick was waiting. Leary climbed into the front passenger seat, putting one of the suitcases inside the passenger compartment. The red cap loaded the footlocker into the trunk of the Dodge with the help of Machado and Chadwick, the red cap doing most of the lifting. The other suitcase was placed in the trunk of the Dodge with the footlocker.

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[1] The district court found that the three "engaged in brief conversation after which they all left the station with a railroad porter." However, it is clear from Agent Christopher's testimony that Chadwick left the terminal alone, before Machado, Leary, and the luggage.

As soon as the red cap was clear of the vehicle, before the trunk lid was closed or the car engine started, the federal agents closed in and arrested the trio. It was then about 9:15. Machado and Chadwick were standing at the back of the vehicle; Leary was seated in the front seat. The two males were quickly frisked and all three were handcuffed. No guns or weapons were found on any of them. Keys to the footlocker and receipts and documents of ownership were found on Machado, but no keys or documents were found on Chadwick so as to link him to the footlocker. A key was found on Chadwick's person, of which a duplicate or similar type was found in Leary's possession; it was believed to be a safe deposit box key, not a trunk key. They were all then taken in government vehicles, Chadwick and Machado in one and Leary in another, to the John F. Kennedy Building (JFK). The Dodge Polara was seized for the purpose of forfeiture because of its use to facilitate the transportation of marijuana, 21 U.S.C. § 881. One of the agents drove it to JFK at the same time, the footlocker and suitcases still inside. Subsequent to the arrest, Agent Christopher testified, the footlocker was under his control at all times. No accomplices were suspected or known to be in the area.

En route to JFK, a five minute trip, Officer Walsh read to Chadwick and Machado their *Miranda* rights. Agent Christopher repeated the warnings and asked Chadwick point by point if he understood those rights and that he could waive those rights. Chadwick ac-

knowledged that he understood that he could waive them. He was not requested to execute a waiver and there is no evidence that he did so. Machado refused to give his name or answer any questions. There was then a brief exchange between Agent Christopher and Chadwick. As Agent Christopher recounted the conversation:

> "I asked the defendant Mr. Chadwick his name, and he gave it to me.
>
> I asked the defendant Machado his name, and he refused to answer.
>
> I then asked Mr. Chadwick how it came to be that he was—where he was from? And he said, Salem, New Hampshire.
>
> I asked him why he was all the way down here from Salem, New Hampshire? And he said that Mr. Machado had called him.
>
> He asked me how I knew what was in the trunk. And I told him that he had it wrong; I asked the questions.
>
> I asked him how he knew what was in the trunk, and he didn't answer. He said he didn't know what was in the trunk.
>
> I asked him what his phone number was.
>
> He said he didn't have a phone.
>
> Then I asked him how he could get a call from Mr. Machado?
>
> He said that everything that he said I was twisting, and he didn't care to answer any more questions."

Chadwick said nothing further. After they arrived at JFK, Agent Christopher put Chadwick through

routine booking information. *Miranda* warnings were repeated and there was further conversation:

> "I took routine booking information—name, address, and so on.
>
> At that time Mr. Chadwick stated that he lived, I think it was 100 Riverway in Brookline or near Boston. I don't recall if it was Brookline or not.
>
> I again asked him for his phone number at that address. He said he had no phone.
>
> I asked him how he got the phone call from Mr. Machado. He said he received it on the phone of a friend who lived in the apartment above him at 100 Riverway, that would be the third floor apartment.
>
> And I believe I asked him how he knew to be at that phone at that particular time to receive a call. I don't believe he responded to that question.
>
> I don't think there were any other questions other than booking information asked of him."

A small quantity of marijuana was found on Chadwick's person.

The footlocker and suitcases were taken into the ODALE office at JFK within minutes of the prisoners' arrival. The footlocker was double-locked with a padlock and regular trunk latch, which the agents first noticed when they removed it from the Dodge Polara at JFK. It was opened in the ODALE office by the agents, using the keys found on Machado, sometime between 9:30 and 11:00 p.m. A large quantity of marijuana was found inside. Agent Chris-

topher testified that the search was delayed until they reached JFK because there were too many people on the street at South Station when the arrest was made. The two suitcases were also brought into the ODALE office for inventory pursuant to Drug Enforcement Administration regulations. The agents did not suspect that they contained marijuana. Both suitcases were locked; none of the defendants claimed ownership or produced keys, and permission to open the suitcases was not sought or obtained from any of them. The agent in charge broke the suitcases open. Marijuana was found inside both. No inventory list of their contents was offered into evidence, nor was there evidence that one was prepared.

No search warrants were ever secured for either the footlocker or the suitcases.

Warrantless Search of Footlocker

The warrantless footlocker search was made at the ODALE office an hour or so after defendants were arrested and the footlocker seized. At the time of the search, the agents had without doubt probable cause to believe there was a controlled substance therein. They did not, however, possess a search warrant. The question, therefore, is whether their warrantless search fits within one of the exceptions to the constitutional requirement of a warrant, for, as the Supreme Court has said, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few

specially established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967), *quoted in Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-55 (1971); *United States* v. *Watson*, 44 U.S. L.W. 4112, 4116, 4117 (U.S. Jan. 26, 1976) (Powell, J., concurring). The burden, moreover, "is on those seeking the exemption to show the need for it." *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951).

At the first suppression hearing, the Government sought to justify the warrantless search of the footlocker under the so-called automobile exception. *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Carroll* v. *United States*, 267 U.S. 132 (1925); *see Texas* v. *White*, 44 U.S.L.W. 3327 (U.S., Dec. 1, 1975). It argued that as the vehicle itself could have been searched without a warrant, so also could the footlocker, as part of its contents. *See United States* v. *Tramunti*, 513 F.2d 1087, 1104-05 (2d Cir. 1975); *United States* v. *Soriano*, 497 F.2d 147 (5th Cir. 1974) (en banc). But the district court, *Acm.* [*sic*] *Coolidge* v. *New Hampshire*, *supra*, at 461-62 (Stewart, J.), to the effect that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears," held that "there was no nexus between the search and the automobile, merely a coincidence." It pointed out that the agents had monitored the progress of the porter and defendants as they moved the footlocker from the station to the vehicle. The arrest and seizure occurred just after the footlocker had been deposited in the parked car's trunk. The trunk lid was still open,

the driver was not yet at the wheel, and the motor had not yet been started. "Under the circumstances," said the court, "the floor of the autmobile was nothing more than a platform or resting place for the footlocker." We agree. No reason comes to mind why the footlocker's placement in the car trunk should make it any more searchable than if the arrest had occurred in the station area. *See Coolidge* v. *New Hampshire*, *supra*.

Upon petitioning the district court for reconsideration, the Government no longer pressed the automobile exception, but rather turned to its present theory, that a warrantless search of the footlocker was permitted "incident" to the arrest of its owner (Machado),[2] and that such a search was therefore lawful when conducted a short time later at the ODALE office. *See United States* v. *Edwards*, 415 U.S. 800, 803 (1974) ("searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention"). *But see Preston* v. *United States*, 376 U.S. 364, 367 (1964).

The district court found the Government's new theory unpersuasive. The court held that the footlocker could not have been searched incident to the

[2] Machado does not contest the lawfulness of his arrest, and we have no doubt that the agents had probable cause to arrest him and could do so without an arrest warrant. *United States* v. *Watson*, 44 U.S.L.W. 4112 (U.S. Jan. 26, 1976); *see United States* v. *Race*, No. 75-1169 (1st Cir., Jan. 30, 1976).

arrest as it was then outside the area of defendants' immediate control. The court relied on *Chimel* v. *California*, 395 U.S. 752 (1969), which restricts a warrantless search incident to an arrest to the arrestee's person and the area "within his immediate control," meaning "the area from which he might gain possession of a weapon or destructible evidence." *Id.* at 763. The court found that a "double-locked, two hundred pound container" that had already been placed in the open trunk of the automobile at the time of the arrest was not an "area within his immediate control"; and as the search of the locker could not be justified as a search incident to the arrest had it taken place contemporaneously with the arrest, the later search was illegal a *fortiori*. 393 F. Supp. at 375 & n.4.

The Government now contends (1) that the district court erred in relying on *Chimel*, and (2) that the footlocker was within defendants' control at the time of arrest, even under *Chimel*.

As to the first point, the Government stresses that *Chimel* involved the search of a house, and points to language in *Weeks* v. *United States*, 232 U.S. 383 (1914), and in this court's decision in *United States* v. *DeLeo*, 422 F.2d 487, 492, *cert. denied*, 397 U.S. 1037 (1970), as evidencing a special concern for the sanctity of the home; consequently, it argues, the stringent standards enunciated in *Chimel* are applicable only to a search of a dwelling. The Government would have [us] to test the legality of a

warrantless search incident to an arrest outside of a dwelling under a standard of "reasonableness."

However, the *Chimel* formulation, limiting an incident-to-arrest search to the person and to the area within the arrestee's control, has recently been repeated with approval in a case that did not involve a building search. *United States* v. *Robinson*, 414 U.S. 218, 225-26 (1973). Nor is its rationale, to prevent access to weapons and destructible evidence, suited only to houses. Courts have applied it in situations analogous to this. *See United States* v. *Rothman*, 492 F.2d 1260, 1265-66 (9th Cir. 1973); *United States* v. *Colbert*, 454 F.2d 801 (5th Cir. 1972), *rev'd on other grounds*, 474 F.2d 174 (1973) (en banc). And, of course, the fourth amendment itself is not limited to dwellings.[3] *See, e.g., United States* v. *Van Leeuwen*, 397 U.S. 249 (1970) (first-class mail search); *Rios* v. *United States*, 364 U.S. 253 (1960) (package search).

Thus we find *Chimel* relevant, and, indeed, we know of no decision of the Supreme Court that is more relevant to the arrest situation presented here.[4]

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[3] The fourth amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[4] This is, of course, not to say that the Supreme Court might never relax the "immediate control" test in the baggage search area, by reinterpretation or otherwise. But it would be speculation, and perhaps even presumption, for us to initiate such a change. Even assuming that greater flexibility is desirable to accommodate searches for contraband, it is debatable whether the arrest exception would be the best vehicle to accomplish this. *See infra.* The arrest exception does not require probable cause to search, and if the mere fact of arrest were to allow an unlimited baggage search, it might be feared that people would be arrested on technicalities in order to search all their belongings. We take no position on the matter but feel, in any event, that revisions of this sort are best left to the high Court.

Moreover, in the area of criminal investigatory searches at least, the Supreme Court has not clearly signalled any retreat from the requirement that warrantless searches be confined to "well-delineated exceptions"—such as the arrest exception. *Katz* v. *United States, supra.* The requirement, coupled with the Court's explicit rejection in *Chimel* of the more flexible guidelines prevailing in the pre-*Chimel* era, *see, e.g., United States* v. *Rabinowitz*, 339 U.S. 66 (1950), rules out our adopting the Government's proposed "reasonableness" approach. The question before us is simply whether the search falls within the boundaries of the particular exception.

Applying *Chimel*, we find no error in the lower court's decision that the footlocker was not an area within the arrestee's immediate control. In so holding, the district court rejected the Government's attempt to analogize the footlocker search to that of hand-carried briefcases and other luggage, searches of which various Courts have approved. *See Draper* v. *United States*, 358 U.S. 307 (1959); *United States* v. *Buckhanon*, 505 F.2d 1079, 1082 (8th Cir.

1974); *United States* v. *Maynard*, 439 F.2d 1086 (9th Cir. 1971); *United States* v. *Mehciz*, 437 F.2d 145 (9th Cir.), *cert. denied*, 402 U.S. 974 (1971); *United States ex rel. Muhammad* v. *Mancusi*, 432 F.2d 1046 (2d Cir.), *cert. denied*, 402 U.S. 911 (1970). The district court said,

> ". . . In all of these cases, the luggage that was searched was being carried by the defendant at the time of his arrest. It may be that hand-carried luggage is encompassed in the phrase 'area within his immediate control.' But the footlocker in this case was not hand-carried luggage. . . ."

Since the decision below, this circuit has also upheld a warrantless search of a hand-carried briefcase at the scene of the arrest, after the arrestee was handcuffed and in custody. *United States* v. *Eatherton*, 519 F.2d 603, 610-11 (1975). However, we must agree with the district court that there is a considerable difference between items such as Eatherton's hand-carried briefcase and the footlocker here. Portable objects in hand such as zipper bags, briefcases and small suitcases, fit without too much difficulty into *Chimel's* "immediate control" standard. Their size, accessibility, and portability all liken them to "personal effects" [5] found on an arrestee's person, such as clothing or a cigarette package in one's pock-

[5] In another setting, Chief Judge Coffin has described a briefcase as a "personal effect" that "does not clearly fall either within the realm of a personal search or a search of the premises." *United States* v. *Micheli*, 487 F.2d 429, 431 (1st Cir. 1973).

et, which may lawfully be searched without a warrant as incident to an arrest. *See United States* v. *Robinson, supra; United States* v. *Edwards, supra.* To exclude searches of such items can create "gossamer thin" distinctions which arresting officers could find impracticable, if not impossible, to follow; and, where the justification for a search depends to a great extent on the reasonable judgments which the arresting officers could have made at the time of arrest, *see United States* v. *Robinson, supra*, those distinctions would appear unwarranted.

However, a two hundred pound footlocker is quite different. It is difficult to liken this footlocker to a hand-carried bag and say in any meaningful sense that the footlocker or, more importantly, its contents, were under defendants' immediate control. It was far from portable, and too heavy even to be carried by the average person. It had also, as the agents well knew, just been unloaded from a train's baggage car after a cross-country trip suggesting, as proved to be the case, that it was tightly secured and could not be opened; nor did the agents observe it open before they themselves opened it. We thus see no basis for disturbing the court's finding that, for purposes of the *Chimel* standard, "this footlocker was simply not within the control of the defendants at the time of arrest." [6]

[6] This is not to say that even a bulky footlocker could never be such an area if, for example, there was reason for the

While, as noted, we understand the Government to be relying on the search-incident-to-arrest exception, part of its argument suggests that it may also be looking in the direction of liberalized luggage search rules approved in several other circuits. These, while arising in an arrest context, draw heavily upon the rationale underlying the automobile search exception in *Chambers* v. *Maroney, supra. United States* v. *Mehciz, supra; United States* v. *Wilson*, No. 75-1247 (8th Cir., Oct. 21, 1975); *United States* v. *Buckhanon, supra; see United States* v. *Johnson*, 467 F.2d 630, 639 & n.8 (2d Cir. 1972), *cert. denied*, 410 U.S. 932, 413 U.S. 920 (1973). The courts in question would apparently allow the warrantless search of luggage for contraband upon the individual officer's determination of probable cause.[7]

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arresting officers to believe that the arrestee had immediate access to its contents. The district court's findings on this score, are, of course, entitled to much weight.

In holding that the footlocker search was not within the arrest exception, we do not, as the dissent would indicate, question the validity of Machado's arrest, nor do we get into any question of whether the search was unduly delayed. We simply hold that the footlocker was beyond the "area of control" that is searchable without a warrant incident to an arrest.

[7] The scope and basis for the novel exception, beyond an analogy to *Chambers*, are barely spelled out in any of the cited cases. One reason that we hesitate to follow such cases is that they present no clear view of the principles to be applied.

It will be remembered that in *Chambers* v. *Maroney, supra*, the Court reaffirmed an established exception, first announced in *Carroll* v. *United States, supra*, allowing the warrantless search of a moving vehicle which officers had probable cause to believe held contraband. The rationale for the *Carroll* and *Chambers* exception was the likelihood that the vehicle would escape before a warrant could be secured. *Chambers* took *Carroll* a step further by allowing not only an immediate on-the-spot search but a later warrantless police station search, sinc the Court reasoned, immobilization of the vehicle until a warrant could be secured was not necessarily a lesser intrusion than a warrantless search, *id.* at 51-52.

Admittedly baggage or goods in transit present some of the same characteristics as automobiles. Unless immobilized, such items may disappear before a warrant is obtained, and immobilization (a step which most courts, including ourselves, will permit, given cause), is arguably just as annoying to the owner as a search. But whatever can be said for this theory, we do not believe that it has received sufficient recognition by the Supreme Court outside the automobile area, or generally, for us to recognize it as a valid exception to the fourth amendment warrant requirement. Baggage predated automobiles, yet *Carroll* and its progeny do not mention baggage as a separate category comparable to vehicles. As we have already noted, exceptions to the warrant rule have

been termed "specially established" and "well-delineated". *United States* v. *Katz*, *supra*.[8] The would-be exception in question hardly fits that description. And we cannot be sure that the intrusion of searching an item of baggage is no greater than detaining it. As to first-class mail, the Supreme Court has held that it is greater. *United States* v. *Van Leeuwen*, *supra*. Certainly such an exception could have considerable impact, as its premises might seem to apply not only to baggage but to mail, express packages, and moving freight of all description. The *Chambers* automobile search exception itself is of a somewhat broader character than other exceptions; it does not, for example, require an accompanying arrest. The fourth amendment is "something less than a seamless web," *Cady* v. *Dombrowski*, 413 U.S. 433, 440 (1973). Standards applicable to one particular exception may not be readily translatable into another. If an exception of this character is to be translated to an entirely different class of objects,

[8] Justice Powell has recently underscored this proposition, stating that "[t]here is no more basic constitutional rule in the Fourth Amendment area than that which makes a warrantless search unreasonable except in a few 'jealously and carefully drawn' exceptional circumstances." *United States* v. *Watson*, 44 U.S.L.W. 4112, 4117 (U.S. Jan. 26, 1976) (concurring), *quoting Jones* v. *United States*, 357 U.S. 493, 499 (1958). This rule is quite different from the more expansive principles applicable to warrantless arrests, which, e.g., allow a police officer to arrest solely on probable cause and without a warrant someone who has committed a felony. *Id.*

we think the Supreme Court should make the judgment.

We are constrained to agree, therefore, with the district court that the warrantless search of the footlocker did not fall within any recognized exception to the general warrant requirement, and that therefore the search was in violation of the fourth amendment. We would add that there was no special exigency justifying a warrantless search under the circumstances, *see United States* v. *Johnson*, 333 U.S. 10, 14 (1948). The Government does not argue that there was. The district court found that the footlocker "was not in imminent or even potential danger of being destroyed or spirited away." Doubtless, the agents had the power to detain the footlocker temporarily at their office or otherwise until a warrant could be procured. *See United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-82 (1974); *United States* v. *Van Leeuwen*, *supra*, at 252; *Terry* v. *Ohio*, 392 U.S. 1, 16-19 (1968).[9] But they were not empowered to search it.

We affirm the district court's order supressing the contents of the locker.

[9] Government agents are given power by statute to seize contraband, 21 U.S.C. § 881. Without deciding how this statutory authority meshes with the fourth amendment warrant requirement and its exceptions, *see, e.g.*, 21 U.S.C. § 881 (b) (1), it reinforces the agents' power to detain baggage at least temporarily. The Government does not contend, however, that the agents' powers under 21 U.S.C. § 881 gave them any greater authority to search than would exist under normal fourth amendment principles.

Warrantless Search of the Suitcases

The government does not argue that in breaking open the two locked suitcases and searching them, the agents were acting pursuant to the search-incident-to-arrest exception. The district court specifically found that the suitcases were outside defendants' control at the time of arrest, and we agree.

The Government argues only that regulations of the Drug Enforcement Administration,[10] as interpreted by the agency, "mandate a complete inventory of the personal belongings of the arrested person," and that compliance with such regulations was reasonable and not in violation of the fourth amendment. The district court found to the contrary. It considered the reasons advanced for the inventory—safeguarding the arrestee's personal property, insulating the agents from later claims or theft of lost property, and institutional safety—and then found,

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[10] Agents Manual, ¶ 6662.25. Collection and Handling of Other Personal Property:

Personal property of non-evidentiary value which is found in a seized automobile will be handled as outlined in ¶ 6654.23.

Agents Manual, ¶ 6654.23. Seizure Procedures:

Upon seizing the vehicle, it must be thoroughly searched. A search performed pursuant to civil seizure need not be contemporaneous with an arrest, and no search warrant is necessary. Remove all articles from the vehicle which are not part of the vehicle itself.

Personal property in the vehicle should be returned to the owner or the person from whom the vehicle was seized, and a receipt obtained.

"None of these considerations is available to justify as inventory searches the breaking into these suitcases. It is simply not credible to suggest that a closed, locked suitcase posed a threat to the institutional safety. . . . No more credible is the theory . . . that the search was necessary to protect the agents from later claims of theft or lost property. It is difficult to see how the integrity of agents is safeguarded by picking the lock to a suitcase. Such forcible entry would likely invite more, rather than fewer, claims of theft. Breaking open the suitcases (the description used by the agent who testified) was an unreasonable and, therefore, unacceptable approach to the problem."

The Supreme Court has not attempted to define generally the conditions in which inventory searches are consistent with the fourth amendment. *See Harris* v. *United States*, 390 U.S. 234 (1968). In inquiring into the reasonableness of the Government's actions in this case, and weighing the privacy rights of the defendants against the Government's interest in doing what it did, the court followed the approach of the eighth circuit in *United States* v. *Lawson*, 487 F.2d 468 (1973), and the California State courts, *see Mozzetti* v. *Superior Court of Sacramento County*, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971). That approach is somewhat at variance with the tenor of decisions in the fifth circuit which tend to validate "routine" inventory procedures unless shown to be carried out in particularly bad faith. *See, e.g., United States* v. *Kele-*

har, 470 F.2d 176 (1972); *United States* v. *Lipscomb*, 435 F.2d 795 (1970), *cert. denied*, 401 U.S. 980 (1971).

We agree generally with the approach taken in *Lawson* and find no reason to overturn the findings below. This is not to dispute the propriety of reasonable inventory procedures designed to safeguard clothing and personal effects; and if in the course of such reasonable good faith efforts an officer stumbles across incriminating evidence, the evidence will not be suppressed. *See Cady* v. *Dombrowski*, *supra; Fagundes* v. *United States*, 340 F.2d 673, 675-76 (1st Cir. 1965); *cf. Cabbler* v. *Superintendent*, 18 Cr L 2314 (4th Cir. Dec. 8, 1975). But just because of its designation as such, an inventory is not immune from the fourth amendment. *United States* v. *Lawson*, *supra*, 471-72. We see an inventory as occupying a middle ground between a criminal investigatory search, which must comply strictly with warrant and probable cause standards, and those actions which fall totally outside the fourth amendment. *See, e.g., Harris* v. *United States*, *supra; Fagundes* v. *United States*, *supra*. Like the search of a code inspector, an inventory may be initiated and carried on upon a less formal basis than a criminal search and will be upheld so long as it serves a proper governmental purpose and does not amount to an excessive intrusion. *Cf. Camera* v. *Municipal Court*, 387 U.S. 523 (1967). The test is reasonableness, and when, as here, there is a dispute, all the facts must be examined. We intimate

no judgment as to the propriety of inventorying unlocked suitcases, nor even locked ones given sufficient reasons, such as suspicion that there may be explosives inside. But breaking open the two locked suitcases here was an unreasonable intrusion that exceeded any proper governmental interest shown to exist. As the court below pointed out, to protect the agents from the later claims, the suitcases could have been sealed with tape which the agents could have initialled, or placed in a locked storeroom with the keys kept in an envelope along with other personal property of defendants. Forcing the locks served no apparent purpose other than to satisfy the agent's curiosity.[11]

Suppression of Chadwick's Conversation with the Agent

The district court suppressed Chadwick's remarks made in response to Agent Christopher's questions a few minutes after Chadwick's arrest. Chadwick was then being driven by the arresting officers to the ODALE office. He had been advised of his Miranda rights, as the court found, but, as Agent Christopher himself testified, had not expressly in-

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[11] The court also found that defendant's permission to open the suitcases was not sought before the locks were picked, although Agent Christopher testified that none of them claimed ownership. Nor was an inventory list ever offered to defendants. The regulations relied on are also, at best, ambiguous as to the authority for such actions. Under the circumstances, the court was entitled to entertain doubts as to the motive behind breaking into the suitcases.

dicated that he waived his rights, by signing a form or otherwise. The court found (1) that Chadwick's arrest was illegal for lack of probable cause and (2) that his responses were "tainted" by the illegal arrest. On the last point, the court found that the Government had not proven a voluntary and knowing abandonment of rights, particularly as Chadwick was interrogated within a few short minutes after being illegally arrested. Relying on *Wong Sun* v. *United States*, 371 U.S. 471 (1963), it found the custodial interrogation to be inherently coercive "even as to one who is lawfully in custody," and even more so "where the initial arrest is illegal."

On whether there was probable cause to arrest Chadwick, we agree with the district court that there was not. That Chadwick arrived at the station to meet the other defendants and assisted in putting the footlocker in his rented car was suspicious but fell somewhat short of being "sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck* v. *Ohio*, 379 U.S. 89 (1964). Chadwick could have been, as the district court found, a friend or relative who knew nothing of the contents of the footlocker. Association with known or suspected criminals does not, in and of itself, establish probable cause. *Sibron* v. *United States*, 392 U.S. 40 (1968); *United States* v. *DiRe*, 332 U.S. 581 (1948). In a case where the facts were similar but even more indicative of guilt, the ninth circuit found no probable cause to arrest. *United States* v. *Jit Sun Loo*, 478 F.2d 401 (1973).

See also United States v. *Linnear*, 464 F.2d 355 (9th Cir. 1972); *United States* v. *Bazinet*, 462 F.2d 982 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010.

The Government argues that because Chadwick momentarily "possessed" the footlocker, his knowing involvement in the marijuana offenses can be inferred from his possession. *United States* v. *Phillips*, 496 F.2d 1395 (5th Cir. 1974); *United States* v. *Bonham*, 477 F.2d 1137 (3rd Cir. 1973; *United States* v. *Palmer*, 467 F.2d 371 (D.C. Cir. 1972); *People* v. *Reisman*, 29 N.Y. 2d 278, 277 N.E.2d 396, 327 N.Y.S.2d 342 (1971); *People* v. *Nettles*, 23 Ill. 2d 306, 178 N.E.2d 361 (1961), *cert. denied*, 369 U.S. 853 (1962). The district court found that, at the time of arrest, Chadwick in fact exercised no "dominion or control" over the footlocker. His contact "was less than that of a porter." This may be an overstatement: the footlocker was put in the car, and the agents could infer that Chadwick was the driver of the car although Chadwick's appearance on the scene had been entirely unexpected. Still, Chadwick's possessory interest was so slight that one cannot fairly infer knowledge of the contents from that fact. *See Leary* v. *United States*, 395 U.S. 6, 36 (1969); *cf.* 9 Wigmore on Evidence § 2491, at 288 (3d ed. 1940).[12]

[12] *Cf. United States* v. *Race*, No. 75-1169 (1st Cir., Jan. 30, 1976) (sole possession of consignee of crate reasonably believed to contain contraband held sufficient to establish probable cause to arrest).

The Government contends that the agents could also rely for probable cause on their policeman's noses. An agent, to be sure, is an expert of sorts, and from certain facts he may be able to derive meaning that would elude an untrained or inexperienced person. But it is one thing to credit an agent's skilled interpretation of adequate facts, and another to credit the agent's suspicions simply because the agent is an agent. Good hunches are the foundation of good police work, but they are not probable cause. The case cited by the Government, *United States* v. *Kancso*, 252 F.2d 220 (3d Cir. 1958), and others, *United States* v. *Davis*, 458 F.2d 819 (D.C. Cir. 1972) and *Ortiz* v. *Craven*, 442 F.2d 418 (9th Cir. 1971), all presented a factual basis from which the trained observer could reasonably believe that the suspect had committed or was committing an offense. We affirm the ruling below that the arrest was illegal.

We also affirm the court's exclusion of Chadwick's remarks. *Wong Sun* was recently reaffirmed by *Brown* v. *Illinois*, 422 U.S. 590 (1975), and while the latter scarcely answers all the questions left after *Wong Sun*, it makes plain that *Miranda* warnings alone do not validate admissions secured following an illegal arrest. Here, as the district court found, the admissions were made a few short minutes after the arrest, a factor militating against admissibility, *id.* at 603.

It is true that weighing in the Government's favor is the relative innocuousness of the arrest: while

the agents should have known that they lacked probable cause, they had good reason to suspect Chadwick, and there is no evidence that they acted in bad faith. Still the error was not a mere technical infraction, such as Justice Powell described in his concurrence in *Brown* v. *Illinois*, as when officers rely on a warrant later invalidated. *Id.* at 611. Furthermore, the district court found that Chadwick did not effectively waive his *Miranda* rights, and that consequently his admissions were not themselves voluntary, *see Escobedo* v. *Illinois*, 378 U.S. 478, 490 n. 14 (1964), the "threshold requirement" of admissibility. 422 U.S. at 604. This finding was perhaps not compelled in the circumstances, but it was not clearly erroneous. *Leavitt* v. *Howard*, 462 F.2d 992, 996 (1st Cir.), *cert. denied*, 409 U.S. 884 (1972). Taken together, the court's findings amount to a supported determination that the admissions were not a product of "free will" as required under *Wong Sun* and *Brown* v. *Illinois*, *supra*, at 603. We necessarily place much reliance in these matters on the "learning, good sense, fairness and courage of federal trial judges." *Nardone* v. *United States*, 308 U.S. 338, 342 (1939).

Affirmed.

THOMSEN, *Senior District Judge*, concurring and dissenting:

I agree that there was no sufficient justification to arrest Chadwick or Ms. Leary, that the statements Chadwick made after his arrest were properly suppressed, and that there was no justification for opening Ms. Leary's suitcase or Machado's suitcase as and when they were opened; but I respectfully dissent from that portion of the opinion which holds that opening the footlocker in the JFK building violated Machado's Fourth Amendment rights.

The information which the agents had received before the train arrived in South Station justified their suspicion that the footlocker contained contraband (a large quantity of marijuana). After Duke, the detector dog, trained to sniff out controlled substances, gave an "alert response", the agents had probable cause to believe that the footlocker contained contraband; they also had probable cause to believe that Machado, who had traveled on the same train with the footlocker and had claimed it when it was unloaded from the train and was then sitting on it, was committing a felony in their presence. They might have arrested Machado then, *United States* v. *Watson*, —— U.S. —— 44 LW 4112 (January 26, 1976), and did not lose that right by waiting until Machado caused the footlocker to be placed in the trunk of the automobile. I believe that the agents could also have seized and searched the footlocker in the station, after the dog gave the affirmative signal, on the ground

that there was probable cause to believe that it contained contraband and was being used in committing the offense. This conclusion is supported by *United States* v. *Buckhanon*, 505 F.2d 1079 (8 Cir. 1974); *United States* v. *Johnson*, 467 F.2d 630 (2 Cir. 1972), *cert. denied*, 410 U.S. 932, 413 U.S. 920 (1973); *United States* v. *Mehciz*, 437 F.2d 145 (9 Cir.), *cert. denied*, 402 U.S. 974 (1971).

A railroad station, after the arrival of a train, is not a good place to conduct such an arrest and search, especially when the agents did not know whether one or more men might respond to the telephone call Machado had made. Nor is a street outside the station a good place to open a footlocker containing marijuana. The agents acted wisely in arresting Machado at the car, and in postponing until they arrived at JFK opening the footlocker, to confirm the fact that it contained contraband. If it had proved not to contain contraband, the agents should and presumably would have released Machado immediately. He was not hurt by the delay in opening the footlocker.

The thorough review of Fourth Amendment cases in the majority opinion herein illustrates the thicket through which state and federal judges, as well as state and federal law enforcement officers, must struggle in cases such as this. I believe that the cases cited above justify the conclusion that the principles which control the right of an officer to arrest without a warrant a person who is committing a felony in his presence in a public place should also permit

the officer to open a suitcase, a footlocker or other container which he has probable cause to believe is being used to commit the offense in his presence and to seize the contraband therein.[1]

[1] No invasion of a house or other real property was involved in this case.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 75-1165

UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH A. CHADWICK ET AL.,
DEFENDANTS, APPELLEES

JUDGMENT

Entered March 29, 1976

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

/s/ Dana H. Gallup, *Clerk.*

APPENDIX C

UNITED STATES DISTRICT COURT,

D. Massachusetts

Crim. No. 73-239-T

THE UNITED STATES

v.

JOSEPH A. CHADWICK ET AL.

Jan. 13, 1975

SUPPLEMENTAL OPINION—April 10, 1975

OPINION AND ORDER

TAURO, District Judge.

Defendant Joseph Chadwick and his two co-defendants, Bridget Leary and Gregory Machado, are charged in a two count indictment with possessing marijuana with intent to distribute, and with conspiring to possess with intent to distribute.

Before the court is Chadwick's motion to suppress the fruits of warrantless searches of a footlocker, two suitcases, and of his person. The searches were conducted by government agents some time after his arrest outside the South Station railroad terminal on May 10, 1973. He has also moved to suppress statements made by him after his arrest.

In support of his motion, Chadwick asserts 1) that his warrantless arrest was without probable cause; 2) that there was no justification for a search of his person; 3) that although he was in a custodial situation when he made statements to federal agents, he was not warned of his rights; and 4) that the warrantless search of the footlocker and luggage cannot be justified by any exception to the requirements of the Fourth Amendment.

Following the hearing on Chadwick's motion to suppress, defendant Leary filed a motion to suppress all evidence obtained by the warrantless searches of the footlocker and suitcases that were seized by the federal agents. She also moved to suppress any statements made by her following her arrest on the grounds that the arrest was made without probable cause. Both Leary and Chadwick rely on the same grounds for suppressing the evidence obtained as a result of the warrantless search of the footlocker.[1] The Government has chosen to rely on the same argu-

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[1] Marijuana was found in both of the suitcases as well as in the footlocker. For convenience in reference and because the items searched are legally indistinguishable, both the Government and the defendants have focused on the footlocker. While some factual details are different (the suitcases were not leaking talcum powder; the dog alerted to the footlocker, not the suitcases; the suitcases were smaller than the footlocker; there was no evidence of a second lock on the suitcases; the information from San Diego related to the footlocker, not the suitcases), none of these factors, either singly or in combination would warrant a different result on the motion to suppress. Accordingly, the decision of this court applies to both the suitcases and the footlocker.

ment in opposition to both motions. Accordingly, the motions to suppress are consolidated in this opinion.

The circumstances surrounding the defendants' arrest and the subsequent search are as follows.

On May 8, 1973, federal agents in Boston received reliable information from their San Diego counterparts that a footlocker suspected of containing marijuana was being shipped by train to Boston. This information indicated that the trunk in question was leaking talcum powder, a substance used to mask the odor of marijuana, and that the shipper, the defendant Machado, fit a profile used by Amtrak officials to spot drug traffickers. The destination address of the footlocker was Machado's Massachusetts residence. Machado obtained passage for two to Boston on the same train in the name of Mr. and Mrs. Machado. His traveling companion was subsequently identified as the defendant Leary. This information, together with a description of Machado, was furnished by Amtrak officials to the San Diego agents and was relayed to agents in Boston.

The Boston agents determined that Machado's train was due at approximately 7:50 p.m. on May 10, 1973. While some preliminary investigation was done on May 8, 9 and 10, the agents made no attempt to secure search or arrest warrants. When the train stopped at New Haven on May 10, Amtrak officials verified that the footlocker was still aboard. This information was conveyed to the Boston agents who placed South Station under surveillance.

The train arrived in Boston approximately one hour late. The agents identified Machado from the description that had been provided them. They observed Machado and Leary take possession of an old brown footlocker and two suitcases. A trained detector dog was brought into the station rotunda near where Machado and Leary were waiting. The dog "alerted" to the presence of marijuana in the footlocker which Machado and Leary had claimed.

After claiming the footlocker, Machado was observed making a telephone call. The agents were unable to see the number that was dialed, nor did they overhear any portion of the conversation.

Shortly thereafter, Chadwick entered South Station and went up to Machado and Leary. The three engaged in brief conversation after which they all left the station with a railroad porter who was pushing the footlocker on a baggage cart. Leary entered the passenger side of a Dodge Polara automobile parked outside South Station. Machado and Chadwick assisted the porter in placing the footlocker onto the floor of the automobile's trunk. The automobile engine was not running and the trunk lid was wide open. At this point, approximately 9:15 p.m., federal agents, who were among a number of law enforcement officials staking out the area, placed all three defendants under arrest and took possession of the automobile and the footlocker as well as the personal luggage of defendants Machado and Leary. Subsequent to their arrest, keys and documentation indicating his ownership of the footlocker were found

on the defendant Machado. No such evidence was found on the defendant Chadwick.

The defendants were driven to the John F. Kennedy Federal Building (J.F.K.) in government vehicles. A government agent drove the Dodge Polara with the footlocker still in its trunk to J.F.K. Sometime between 9:30 and 11:00 p.m., federal agents opened the footlocker in their J.F.K. offices, and found a large quantity of marijuana. Marijuana was also found in the two suitcases. At no time did the federal agents secure a search warrant.

Arguably incriminating statements were made by the defendant Chadwick subsequent to his arrest, either in the vehicle on the way to J.F.K. or at the agents' J.F.K. offices.[2] A search of Chadwick's person following his arrival at J.F.K. revealed a small amount of marijuana.

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[2] The statements made by Chadwick were part of a conversation that he had with two federal agents. While the anegts who accompanied Chadwick to the J.F.K. building testified differently as to where the conversation occurred, they both agreed as to the substance of the conversation. Chadwick said that he had come down from Salem, New Hampshire, to pick up a friend. Then he asked the agent how he knew what was in the trunk. The agent responded that he would ask the questions and asked Chadwick how he knew. Chadwick said that he did not know what was in the trunk. Precisely where the conversation occurred is immaterial for the purposes of this motion to suppress since both agents agreed that it occurred after Chadwick was arrested.

I. PROBABLE CAUSE TO ARREST CHADWICK

Chadwick claims that his arrest was without probable cause, and this court agrees.

Probable cause to effectuate a warrantless arrest only exists "if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." Henry v. United States, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134 (1959). *Accord*, Brinegar v. United States, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 93 L. Ed. 1879 (1949); Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The circumstances surrounding Chadwick's arrest fall short of meeting this standard.

There is no evidence as to whom Machado called from the South Station. But even if it may be presumed that Machado called to inform Chadwick of his and Leary's arrival, a non-criminal explanation of Chadwick's conduct is at least as likely as one indicating that "an offense has been or is being committed." Brinegar v. United States, 338 U.S. at 176, 69 S.Ct. at 1311.

Simply stated, the non-criminal explanation is that two friends of Chadwick arrived by train from an out-of-town trip. The train was late. They called and asked him to pick them up at the station. He arrived at the station, exchanged pleasantries and assisted the porter in placing their luggage in the open trunk of a car. Then, he was arrested.

There was no evidence that agents had been alerted, during the several days they were awaiting Ma-

chado's and Leary's arrival, to the likelihood or even the possibility of a third party accomplice being involved. There was no evidence that Chadwick was recognized as a trafficker by the agents who observed him entering South Station. There was no evidence that the defendant Chadwick knew what was in the trunks, nor can such knowledge be inferred from the record. The most the government can squeeze from these operative facts is that, when arrested, Chadwick was in the presence of two people suspected of criminal activity. His presence at the railroad station and his momentary contact with the footlocker, as he assisted the porter and Machado in placing it in the trunk of the car, are fully explicable in terms of noncriminal conduct and add nothing to the government's case. "Mere presence at the scene of a criminal offense does not support an inference of guilt of that offense." Newsom v. United States, 335 F.2d 237, 239 (5th Cir. 1964). *See, e.g.*, McDonnell v. United States, 472 F.2d 1153, 1156 (8th Cir.), cert. denied 412 U.S. 942, 93 S.Ct. 2785, 37 L.Ed.2d 402 (1973).

The Government concedes, at page three of its memorandum, that to a lay observer the circumstances of Chadwick's involvement might appear innocent, but argues that an experienced agent would recognize them as being significant. According to the Government, an experienced observer could readily detect that Chadwick was being used as a "mule" —a courier for transporting drugs. This argument would appear to urge adoption of a subjective stand-

ard of probable cause which would require, as a threshold matter, an evaluation by the court of an agent's experience and ability in order to weigh what criminal significance he might have legitimately ascribed to a given set of circumstances. To adopt such a standard would set an unfortunate precedent with the distinct possibility of facially inconsistent results, depending on the impression a particular agent made on a particular judge.

Certainly, as was noted in United States v. Kancso, 252 F.2d 220, 222-223 (2d Cir. 1958), government agents, in their efforts to protect the public, must depend on a variety of resources, including their own knowledge and expertise. This is why undercover efforts are permitted, and the law with respect to entrapment is geared to protect unwary innocents as opposed to unwary criminals. It is quite another matter to say, in effect, that probable cause is in the eyes of the beholder; that the results of a probable cause hearing could vary depending on whether the key witness happened to be a government agent as opposed to a private citizen. It would be impossible to rationalize such an approach with a concept so fundamental to fair trial; *i. e.*, that, subject to exceptions not here material, the weight and credibility of all testimony is to be judged by the same standards.

We do not handcuff our government agents by requiring that they arrest only when the facts upon which they wish to rely would warrant *a man of reasonable caution*—as opposed to one of extraordi-

nary sophistication—in concluding criminal activity was taking place. They are merely required to meet a standard that can be understood by the average reasonably prudent person.

The Supreme Court has consistently rejected any attempt to dilute the probable cause safeguard. Neither mere suspicion nor subjective good faith can substitute for objective, probable cause as a basis for arrest.

> Anything less [than probable cause] would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.

Terry v. Ohio, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968) *citing* Beck v. *Ohio*, 379 U.S. 89, 96-97, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L. Ed.2d 1688 (1960); Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959).

The Government's effort to justify the arrest on the grounds that Chadwick was at least in constructive possession of the footlocker and, therefore, is presumed to know of its contents must also fail. There is no evidence sufficient to warrant a finding that, at the time of arrest, Chadwick had exercised any dominion or control over the subject footlocker. His contact with the footlocker in the South Station was less than that of the porter. His assisting the porter and Machado in placing the footlocker in the trunk was not an exercise of dominion and control.

Indeed, the fact that the footlocker had been placed on the floor of the car's trunk did not transform Chadwick's role or status into a possessory one. As a matter of fact, the agents had no information prior to Chadwick's arrest that he owned or had rented the Dodge Polara, or that he was the one who drove it to South Station. On the facts available, Chadwick was no different from thousands of others who pick up passengers at various terminals and yet cannot be deemed to have dominion or control of their baggage. The evidence being insufficient to warrant a finding of possession, there can be no permissible inference of knowledge with respect to the contents of the footlocker.

Even assuming, however, that somehow at least a joint constructive possession on the part of Chadwick could be presumed, the facts do not warrant a presumption of knowledge as to the footlocker contents.

In Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), which dealt with a statutory presumption of knowledge, the Court established that such a presumption is unconstitutional "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Id.* 395 U.S. at 36, 89 S.Ct. at 1548. This standard is also applicable to common law inferences such as an inference of guilty knowledge from the fact of unexplained possession of stolen goods. *See* Barnes v. United States, 412 U.S. 837, 845 n. 8, 93

S.Ct. 2357, 37 L.Ed.2d 380 (1973). Thus, there can be no automatic inference from Chadwick's momentary joint possession of the footlocker trunk that he knew the trunk contained marijuana.

None of the cases cited by the Government adequately support its position that knowledge of the contents can automatically be inferred from momentary possession. Primary reliance is placed on People v. Nettles, 23 Ill.2d 306, 178 N.E.2d 361 (1961), cert. denied, 369 U.S. 853, 82 S.Ct. 939, 8 L.Ed.2d 12 (1962). That case dealt with possession of narcotics that were found in the apartment in which the defendant was living, a factual situation clearly distinguishable from the operative circumstances of this case.

State v. Funk, 490 S.W.2d 354 (Mo. Ct.App. 1973), also cited by the Government, stands for the proposition that one in exclusive control of a dwelling may be deemed to knowingly possess what is contained therein. That court drew a major distinction, however, between exclusive and joint control and concluded that where control was joint, some further evidence must be adduced connecting the defendant with the drug. *Id.* 490 S.W.2d at 361. *Accord*, United States v. Bonham, 477 F.2d 1137 (3rd Cir. 1973). In this case, there was no such evidence tying Chadwick to the footlocker or its contents.

The Government also cited People v. Reisman, 29 N.Y.2d 278, 327 N.Y.S.2d 342, 277 N.E.2d 396 (1971), in support of its position. There the evidence showed that the defendant claimed two packages of

marijuana addressed to him at Kennedy Airport. While it may well be valid to infer that a person knows the contents of a package addressed to him, such a proposition has no application to the facts of this case. The destination address of the footlocker was Machado's, not Chadwick's. The trunk was claimed by Machado, not Chadwick. Even the dicta of *Reisman* indicating that one may be presumed to know the contents of his automobile is of no assistance to the Government, there being no evidence prior to his arrest that Chadwick owned, drove or leased the Dodge Polara.[3]

Judged against the standards established by the Supreme Court in Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973); Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970); and Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), this court must conclude that the Government has not sustained its burden of demonstrating that the presumed fact—knowledge—follows more likely than not from the proved fact—momentary, joint possession. Chadwick's conduct is wholly explicable as non-criminal conduct and the Government has adduced no additional evidence linking him with the footlocker containing marijuana.

There having been insufficient cause to justify Chadwick's arrest, his subsequent statements and all

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[3] The ancillary issue as to whether or not, under the circumstances, the footlocker was part of the "contents" of the automobile at the time of arrest is discussed in part III *infra*.

evidence seized during the post-arrest search of his person is suppressed.[4] Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

II. PROBABLE CAUSE TO ARREST LEARY

Defendant Leary has claimed that the agents also lacked probable cause to arrest her. This court disagrees and holds that the facts and circumstances surrounding her arrest were sufficient in themselves to warrant a man of reasonable caution in the belief that she was committing an offense. Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

At the time of her arrest, the agents reasonably believed that she was the wife of the defendant Machado. The tickets for the cross-country train trip were in the name of Mr. and Mrs. Machado. They were seen together in San Diego prior to the departure of the train. They arrived together at South Station; claimed the luggage together and were standing together when Chadwick entered South Station. When they left the station, she immediately entered the automobile while her "husband" and Chadwick assisted the porter in placing their luggage in the trunk.

Having redeemed their luggage together, Machado and Leary had joint possession and control of the footlocker trunk. The agents had probable cause to believe that it contained marijuana. The agents had probable cause to believe that the "wife" knew the contents of the baggage that accompanied her and her husband across the country. Indeed it strains credulity to suggest that a spouse would not know the contents of such a significant piece of luggage. That Leary was not the wife of Machado and that, in fact, she may not have known the contents of the footlocker is immaterial to a finding that the agents had reasonable cause to believe the contrary. Accordingly, this court finds that there was probable cause to arrest the defendant Leary.

III. THE WARRANTLESS SEARCH OF THE FOOTLOCKER

While the defendants, Chadwick and Leary, have disclaimed ownership of any of the luggage seized, they have standing to challenge the search. Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), gives a defendant standing to object to a search when charged with a crime wherein possession of the article is itself an essential element.

It is conceded that the footlocker was searched without a warrant. Warrantless searches are per se

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[4] Chadwick's alternate basis for suppressing his post-arrest statements—lack of *Miranda* warnings—was not supportable on the basis of the evidence presented at the hearing. The credible testimony disclosed that the *Miranda* warnings were read to both Chadwick and Machado by a railroad police officer who accompanied them to J.F.K. The federal agent who drove the vehicle then went over each of the rights and asked the defendants whether they understood each facet of their *Miranda* rights. Both defendants indicated that they understood their rights. This occurred prior to the conversation recited in note 1 *supra*. Hearing Transcript 31-35.

unreasonable, subject to a few carefully delineated and limited exceptions. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The search, therefore, can be justified only if it meets the requirements of some exception to the warrant requirement.[5]

The Government seeks to justify this search as an automobile exception, *see* Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), contending that the facts of this case are controlled by United States v. Soriano, 497 F.2d 147 (5th Cir. 1974) (en banc).

In *Soriano*, the evidence showed that federal law enforcement officials followed a taxi occupied by three people whom the agents had probable cause to believe were transporting heroin. Upon arrival at the Miami International Airport, the agents arrested the occupants of the cab, and removed three suitcases from that vehicle. The agents peeked into one of the suitcases at the place of arrest; the other two were searched at a place other than that of arrest. The district court suppressed the heroin found in all three suitcases. The court of appeals affirmed. Reversing both the district court and the court of appeals panel, the Fifth Circuit Court of Appeals, sitting en banc,

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[5] The recognized exceptions to the warrant requirement are (1) hot pursuit; (2) plain view doctrine; (3) emergency situation; (4) automobile search; (5) consent; and (6) incident to arrest. United States v. Mapp. 476 F.2d 67, 76 (2d Cir.1973).

sustained the search on the rationale of Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

Chambers involved a warrantless automobile search at the police station following a late night arrest of the four defendants who were in their automobile parked in a dark parking lot. In upholding the delayed search, the Court held that a lawful search could have taken place on the spot because the automobile was readily movable and the opportunity to search was fleeting. The Court then reasoned that a warrantless seizure is arguably as intrusive of protected Fourth Amendment rights as a warrantless search. Noting that, for constitutional purposes, there was little to choose between a warrantless search and a warrantless seizure pending receipt of a search warrant from a magistrate, the court concluded, in the context of that case, that "[g]iven probable cause to search, either course is reasonable under the Fourth Amendment." 399 U.S. at 52, 90 S.Ct. at 1981. The delayed search was treated as if the initial exigency validating the warrantless seizure had continued.

Chambers was based on Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Supreme Court case that first articulated the automobile exception to the warrant requirement. The search in *Carroll* occurred on the open highway after police officers had stopped a speeding vehicle suspected of containing contraband liquor.

While the exact parameters of the automobile exception have not been determined, it is important to note at the outset out "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, 403 U.S. 443, 461-462, 91 S.Ct. 2022, 2035, 29 L.Ed.2d 564 (1971) (Stewart, J.).

In all of the so-called automobile exception cases there was a nexus between the search and the automobile; a danger that if the warrantless search were not permitted, contraband might well disappear. In this case, there was no nexus between the search and the automobile, merely a coincidence. The challenged search in this case was one of a footlocker, not an automobile. The search took place not in an automobile, but in J.F.K. The only connection that the automobile had to this search was that, prior to its seizure, the footlocker was placed on the floor of the automobile's open trunk.

Unlike the situation in *Soriano*, the footlocker had not been transported in the automobile. It was being delivered from and not to a public transportation terminal. From the time that the defendants approached the automobile until they were arrested and in custody, the trunk lid of the automobile was never closed. The footlocker remained in plain view at all times. The motor of the car was not running. No one was in the driver's seat behind the wheel. Under these circumstances, the floor of the automobile trunk was nothing more than a platform or resting place for the footlocker.

Arguably, the Boston agents had probable cause to arrest Machado and Leary when they claimed the footlocker at South Station. Even if they did not have probable cause at that instant, they clearly had probable cause after the detector dog had alerted to the presence of marijuana in the footlocker trunk. Had the arrest taken place in the station area, a warrant would have been required before the footlocker could have been permissibly searched. Had the arrest taken place while the footlocker trunk was on the porter's trolley, a warrant would have been required. *See* United States v. Garay, 477 F.2d 1306, 1308 (5th Cir. 1973); United States v. Anderson, 500 F.2d 1311 (5th Cir. 1974). To hold that merely placing the footlocker onto the floor of the trunk of an automobile, parked with its motor off and its driver's seat empty, invokes the automobile exception would be to trigger consideration of the automobile exception anytime an automobile was even remotely in the picture.

But even assuming the facts of this case warrant consideration of the automobile exception, the rationale under which we validate searches of automobiles without a warrant is of no help to the Government here. The concept of a vehicle containing contraband liquor fleeing on the highway in the night is very remote from the situation in this case. *See* Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The various extensions of *Carroll* have all been justified on the presence of some exigency, a realistic danger that evidence would

disappear unless a warrantless search were permitted. In *Chambers*, the Court extended the rule by allowing the officers to defer the search of the automobile until it was taken to the stationhouse. In *Soriano*, the court allowed the luggage that was seized from a taxicab in which the defendants arrived at an airport to be searched in part at the airport and later in full at the stationhouse.

However great or slight the exigencies might have been in those cases, none of them are present here. The automobile was not moving. There were no known or suspected accomplices in the area. In fact, the agents had deferred the arrest until the defendants were outside the station precisely to determine whether there were other individuals involved. The defendants were arrested, handcuffed and placed immediately into government vehicles. There were numerous officers present, including city policemen, railroad guards and federal agents. The arrest took place within 10 blocks of the federal courthouse past which the agents traveled on their way to J.F.K. where the actual search took place. The footlocker was locked with two different locks and, immediately after the arrest of the defendant, the keys that opened the locks were obtained by federal agents. The footlocker, which weighed two hundred pounds, was not in imminent or even potential danger of being destroyed or spirited away.

In brief, no exigency that would justify a warrantless search on the grounds of an automobile exception to the warrant requirement of the Fourth

Amendment can be found on the facts of this case. To rule otherwise would be to establish a per se rule permitting a warrantless search any time an automobile was even remotely involved in an arrest. While such a rule might be convenient for law enforcement officers, as well as for courts which are required to decipher and distinguish the many precedents in this troublesome area, it would be an unnecessary and undesirable dilution of existing Fourth Amendment safeguards.

The Government has placed exclusive reliance on the automobile exception as a basis for validating this warrantless search. That argument has been rejected. The court has examined the other exceptions to the warrant requirement and finds that none of them are applicable to the facts of this case. There being no justification for the warrantless search of the footlocker trunk and suitcases, all evidence obtained therefrom is hereby ordered suppressed.

SUPPLEMENTAL OPINION

On January 13, 1975, an opinion and order was entered granting the defendants' motion to suppress. On February 7, 1975, the Government filed motions to reconsider and to vacate.[1] The motion for reconsideration was granted and a hearing held on the motion to vacate.

In support of its motion to vacate, the Government introduced additional evidence with respect to the search of the suitcases and also offered an additional theory to support the footlocker search. Although none of this evidence was inconsistent with the court's previous findings of fact, it did provide more detail concerning the search of the two suitcases. The court makes the following supplemental findings of fact, but incorporates by reference the findings and conclusions made in its original opinion dated January 13, 1975.

SUPPLEMENTAL FINDINGS OF FACT

As the three defendants departed the South Station terminal, the defendant Leary was carrying one of the two Tourister suitcases (see January 13, 1975

[1] The Government filed a notice of appeal on February 10, 1975. By an order dated February 25, 1975, the Court of Appeals granted leave to the district court to entertain and act on the Government's Motion for Reconsideration. While retaining appellate jurisdiction of the case, the Court of Appeals stayed further prosecution of the appeal pending the action of this court on the Government's motion.

opinion at p. 767) which she placed in the passenger compartment of the automobile. The other suitcase was placed in the automobile trunk with the footlocker. Neither suitcase was opened or removed from the vehicle before the federal agents drove the automobile to J.F.K.

At their J.F.K. offices, the agents opened the footlocker first, using the keys that had been found on the defendant Machado. It was at this time that the marijuana was first seen in the footlocker. (See January 13, 1975 opinion at pp. 767-768).

After having opened the footlocker, the agents then sought to open the two suitcases, ostensibly for the purpose of inventorying their contents. Both suit cases were locked. The agents opened both suitcases by picking their locks. Marijuana was found in both suitcases. Permission to open the suitcases was not sought or obtained from any of the defendants and the agents made no effort to secure a search warrant. Although the Government claims that the purpose for searching these suitcases was to inventory the items contained therein, no inventory list was introduced into evidence. Moreover, there was no evidence that an inventory list was prepared and given to the defendants. The Government represented that the inventory search was conducted pursuant to a procedure specified in the Agents Manual.[2]

[2] Agents Manual, ¶ 6662.25 (A) (2). Collection and Handling of Other Personal Property:

Personal property of non-evidentiary value which is

I

THE FOOTLOCKER SEARCH

The Government's original opposition to defendant's motion to suppress the fruits of the footlocker search was based exclusively on the "automobile exception" to the search warrant requirement. (See January 13, 1975 opinion at pp. 767-768). The Government now asserts that this search should be justified as one incident to arrest. Its theory is that had the search taken place when the defendants were arrested, it would have been valid,[3] and the mere fact it was delayed does not make it any less valid as an exception to the warrant requirement of the Fourth Amendment. The court disagrees.

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found in a seized automobile will be handled as outlined in 6654.23.

Agents Manual, ¶ 6654.23 Seizure Proceedures:

Upon seizing the vehicle, it must be thoroughly searched. A search performed pursuant to civil seizure need not be contemporaneous with an arrest, and no search warrant is necessary. Remove all articles from the vehicle which are not part of the vehicle itself.

Personal propery in the vehicle should be returned to the owner or the person from whom the vehicle was seized, and a receipt obtained.

[3] Since a lawful arrest is a necessary condition precedent to a search incident to arrest, this argument is not applicable to the defendant Chadwick since his arrest was illegal. *See, e.g.*, Henry v. United States, 361 U.S. 98, 102, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); January 13, 1975 opinion at pp. 767-771.

In the recent cases of United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) and Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 38 LEd.2d 456 (1973), which dealt with warrantless searches of the person, the Court noted essential differences between a search of a person as contrasted with a search of the area within his control. A key issue to be determined in the latter situation is the scope and meaning of the phrase "area within his control."

An analytical framework for applying that phrase to differing factual settings was given by the Court in Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969):

> There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

The vitality of the *Chimel* test has not been affected by *Robinson*, *Gustafson*, or other subsequent Supreme Court opinions.

In arguing that a search of a 200 pound, double-locked footlocker is encompassed in the phrase "area within his immediate control," the Government has cited five cases, Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); United States v. Buckhanon, 505 F.2d 1079 (8th Cir. 1974); United States v. Maynard, 439 F.2d 1086 (9th Cir. 1971); United States v. Mehciz, 437 F.2d 145 (9th

Cir.), cert. denied, 402 U.S. 974, 91 S.Ct. 1663, 29 L.Ed.2d 139 (1971); United States v. Lugo-Baez, 412 F.2d 435 (8th Cir. 1969), cert. denied, 397 U.S. 966, 90 S.Ct. 1000, 25 L.Ed.2d 257 (1970). In all of these cases, the luggage that was searched was being carried by the defendant at the time of his arrest. It may be that hand-carried luggage is encompassed in the phrase "area within his immediate control." But the footlocker in this case was not hand-carried luggage. It was a double-locked, 200 pound container that had already been placed in the open trunk of an automobile at the time of the arrest. At the time of the arrest, the defendants had been immediately handcuffed and surrounded by numerous federal and local law enforcement officials. To hold under these circumstances that this footlocker was an area "from within which [the defendant] might gain possession of a weapon or destructible evidence" would be to render meaningless the limitations imposed by the Court in *Chimel*. As a matter of fact, practicality and law, this footlocker was simply not within the control of the defendants at the time of arrest.[4]

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[4] Since this court has ruled that the search of the footlocker could not be justified as a search incident to arrest had it taken place contemporaneously with the arrest, there is no need to determine whether the delayed search could be justified as "substantially contemporaneous." *Compare* Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777 (1964) "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to arrest," *with* United States v. Edwards, 415 U.S. 800, 803, 94 S.Ct. 1234, 1237, 39 L.Ed.2d 771 (1974), "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." See Coolidge v. New Hampshire, 403 U.S. 443, 457, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

II

THE SEARCH OF THE SUITCASES

In its memorandum in support of its motion for reconsideration, the Government asserted that "the opening of the suitcase was effected—not as a search for more incriminating evidence—but simply to inventory the contents of the suitcase according to established DEA procedure." Government Memorandum at 3. Because the Government placed exclusive reliance on the inventory search exception, it did not attempt to justify the search of the luggage on the search incident to arrest exception. In any event, the suitcase searches could not be upheld as incident to arrest because there was no showing that, at the time of arrest, the suitcases were within the immediate possession or control of any of the defendants.

At the time of arrest, both suitcases were locked. One was in the automobile trunk and was as inaccessible as the footlocker. The other was somewhere in the passenger compartment of the automobile. While the defendant Leary was seated on the passenger's side of the front seat, there was no evidence that the suitcase was even within her reach

let alone her control. "[T]he burden is on those seeking the exemption [from the warrant requirement] to show the need for it." United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951). That burden has not been sustained.[5]

The Government's attempts to justify the suitcase searches as "inventory searches" must also fail. This search was not required or authorized by the section of the Agents Manual pursuant to which the Government claims the agents were acting. The relevant portion provides only that "upon seizing the vehicle, it must be thoroughly searched . . . . Personal property in the vehicle should be returned to the owner or the person from whom the vehicle was seized, and a receipt obtained." Agents Manual ¶ 6654.23 (March 19, 1974). This section does not require or even suggest that the agents are authorized to forcibly open a closed, locked suitcase for the purpose of "inventorying" its contents.

Even assuming the Agents Manual could be construed to have authorized the suitcase searches, such authorization would not validate an otherwise unconstitutional search. An inventory search is, nonetheless, a search within the meaning of the Fourth

[5] Even if the suitcase search at a different time and place could be justified as "incident to arrest," it would be difficult to justify that extension to the facts in this case. Both suitcases were locked and no one had the keys to open them. The agents were forced to pick the locks in order to open the suitcases. Such facts demonstrate rather forcefully that the suitcases were not an area from which an arrestee could readily obtain either a weapon or destructible evidence.

Amendment. *See, e.g.*, Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964); United States v. Lawson, 487 F.2d 468 (8th Cir. 1973); Mozzeti v. Superior Court, 4 Cal.3d 699, 94 Cal.Rptr. 412, 484 P.2d 84 (1971); *cf.* Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The reasonableness of an inventory search is to be tested against established constitutional principles, and not on the basis of routine administrative practice.

Inventory searches have been justified for a number of reasons including safeguarding the personal property of the arrestee, insulating the agents from later claims of theft or lost property, as well as institutional safety. None of these considerations is available to justify as inventory searches the breaking into these suitcases. It is simply not credible to suggest that a closed, locked suitcase posed a threat to the institutional safety. The suitcases were securely in the possession of the agents and the defendants were all in custody.[6] No more credible is the theory advanced by the Government that the search was necessary to protect the agents from later claims of theft or lost property. It is difficult to see how the integrity of agents is safeguarded by picking the lock to a suitcase. Such forcible entry would likely invite more, rather than fewer, claims

[6] Agent Christopher testified that the inventory was not conducted because of concern for institutional safety and that the agents did not suspect that the suitcases contained explosives. See Transcript, March 6, 1975 hearing at p. 14.

of theft. Breaking open the suitcases (the description used by the agent who testified) was an unreasonable and, therefore, unacceptable approach to the problem.

Other reasonable alternatives, less drastic but at least as effective, were available to the agents. The locked suitcases could have been placed in a locked storage facility, the key to which locker could then have been sealed in an envelope and kept with the other personal property taken from the defendants. Alternatively, the agents could have placed sealing tape over the lock of the suitcase which could have been initialed by the defendants and/or an agent.[7] Either of these procedures would have been reasonable. The Government's approach was not. Since "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible," Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868, 1878, 20 L.Ed.2d 889 (1968) (citations omitted), the present search, which went far beyond the permissible limits of an inventory search, cannot be upheld on that rationale.

Both of the cases cited by the Government in support of its inventory search rationale are readily distinguishable. In Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968), an

[7] For a discussion of other reasonable alternatives to an inventory search, *see* Mozzetti v. Superior Court, 4 Cal.3d 699, 94 Cal.Rptr. 412, 484 P.2d 84 (1971); Note, The Inventory Search of an Offender Arrested for a Minor Traffic Violation, 53 B.U.L.Rev. 858, 869 (1973).

incriminating piece of evidence came into plain view when a police officer opened the door of defendant's impounded car for the purpose of closing the window since it had just started to rain. Since that minimal intrusion to safeguard the car was a legitimate police function, *Harris* is merely an application of the plain view doctrine. Justice Douglas, concurring, noted that this case did not undermine the Court's previous holding in Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), where the Court held illegal a full-blown inventory search. In Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967), the Court upheld an inventory search of an automobile that was being held subject to forfeiture proceedings. The search occurred one week after the defendant had been arrested and the car impounded. Since "the reason for and nature of the custody may constitutionally justify the search," 386 U.S. at 61, 87 S.Ct. at 791, the Court held that an inventory search pursuant to a forfeiture proceeding was constitutionally permissible.

In this case, there was no claim that the suitcases were being held for forfeiture proceedings. The agents viewed the suitcases as the personal property of the defendants and intended only to "safeguard" their contents pending release of the defendants. Neither *Harris* nor *Cooper* justifies the agent's picking the locks of these suitcases.

III

SUPPRESSION OF CHADWICK'S STATEMENT

The Government challenges this court's order suppressing the statements made by the defendant Chadwick shortly after his illegal arrest. (See January 13, 1975 opinion at pp. 770-771). The Government's position is that the agent's recitation of *Miranda* warnings to Chadwick purged his statement of any taint occasioned by the illegal arrest. This court disagrees.

The Government has focused on only one of two factors deemed important by the Court in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963). The threshold question is whether Chadwick's statement was voluntary. The mere recitation of *Miranda* warnings is not a guarantee that the statement made was voluntary. *Miranda* teaches that in-custody interrogation is inherently coercive, even as to one who is lawfully in custody. That coercive element is exacerbated where the initial arrest is illegal.

> It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not.[8]

[8] Devlin, The Criminal Prosecution in England (1958), *as quoted in* Wong Sun v. United States, 371 U.S. 471, 486 n. 12, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963).

The second element that led to the suppression of the defendant Toy's statement in *Wong Sun* was the perceived need to impose sanctions on the illegal conduct of the police. The Court held that this could best be achieved by depriving the police of the fruits of their illegal conduct. Only where the statement was made as a result of an "intervening independent act of free will" did the Court uphold the admission of the statement made following an illegal arrest.

Both factors are relevant to this case. Although the defendant had received his *Miranda* warnings in the agents' car shortly before the allegedly incriminating statement was made, he was not requested to execute nor did he execute a waiver of his *Miranda* rights. The Government has the heavy burden of establishing that Chadwick both *voluntarily* and *knowingly* abandoned his right to remain silent. This is particularly so since he was interrogated within a few short minutes after being illegally arrested. The Government has failed to meet this burden.

The court reaffirms its opinion and order of January 13, 1975. The motion to vacate that order is hereby denied.

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